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May 6, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: June 28, 2004

Case No.: TIA-0121

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the illnesses were not related to work at the DOE. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the Appeal should be granted.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a physician panel, a negative determination by a physician panel that was accepted by the OWA, and a final decision by the OWA not to accept a physician panel determination in favor of an applicant. The instant appeal was filed pursuant to that section. The Applicant sought review of a negative determination by a physician panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004) (the Authorization Act). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant filed a Subpart B application with DOL, claiming prostate cancer. The Applicant filed a Subpart D application with OWA, claiming prostate cancer and several other illnesses. The Applicant claimed employment as a plumber/steamfitter at the DOE's Hanford site from 1965 to 1987. Record at 8-9, 16.

The Hanford site verified that the Applicant was employed at the site, but not for the claimed period. The Hanford site stated that it located (i) a 1975 treatment record, which indicated a presence at the site for an unknown period, and (ii) dosimetry records for a one-month period in 1977. Record at 14-15.

The DOL and the OWA processed the applications. The DOL provided the Applicant with an opportunity to submit additional information to support his claim of lengthy employment at the site. The DOL file contains additional information, such as the Applicant's social security records, but the DOL did not find employment beyond that verified by the Hanford site. The DOL referred the

prostate cancer claim to the National Institute of Occupational Safety and Health (NIOSH) for a radiation dose reconstruction, stating the verified employment as a month in 1975 and a month in 1977.

With respect to his OWA application, the Applicant elected to have OWA send his application to the Physician Panel, without awaiting the results of the dose reconstruction. The OWA referred the application to the Panel, which issued a negative determination on the claimed illnesses.

The Applicant filed an appeal, stating that he disagreed with the determination. We provided the Applicant with an opportunity to submit additional information to support his claim of lengthy employment at the site, such as affidavits from co-workers, but we did not receive any information.

In our review of the file, we noted that the Applicant's social security records showed employment by numerous companies during the claimed period of employment at the site. Record at 331-344. We forwarded the relevant portion of the list, Record at 333-344, to the OWA and asked whether any of the employers were subcontractors at the site during the period when they employed the Applicant. The OWA responded that Stone and Webster Engineering Corp., the Applicant's employer in 1969 and 1970, was a Hanford subcontractor and "probably" performed work at the site during that period. OWA May 2, 2005 letter to OHA.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12.

Although the Applicant bears primary responsibility for supporting a claim, "the DOE will assist applicants as it is able." See 67 Fed. Reg. 52,841, 52,844 (2002). In processing the application, the OWA did not identify Stone and Webster as a Hanford subcontractor during the period the firm employed the Applicant. Although such information may not be sufficient, by itself, to demonstrate the claimed employment, it is relevant information that should have been provided to the Applicant. Accordingly, reconsideration of the application may be warranted.

If the Applicant wishes to pursue a claim of employment during the period of 1969 to 1970, he should consult the DOL on how to proceed.

In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's grant of this appeal does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0121, be, and hereby is, granted.
- (2) The OWA has provided additional information that may help the Applicant demonstrate his employment at the site.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 6, 2005

